HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Uncorrected oral evidence: Human rights at work, HC 1161

Wednesday 25 October 2023

3 pm

Watch the meeting

Members present: Joanna Cherry (Chair); Lord Alton of Liverpool; Lord Dholakia; Lord Henley; Baroness Kennedy of The Shaws; Baroness Lawrence of Clarendon; Baroness Meyer; Bell Ribeiro-Addy.

Questions 52 - 63

Witnesses

I: Ijeoma Omambala KC, Barrister, Old Square Chambers; Akua Reindorf KC, Barrister, Cloisters Chambers; Professor Robert Wintemute, Professor of Human Rights Law, King's College London.

II: Gill Hunter, Chair, Equity Commission, British Chambers of Commerce, and Managing Partner, Square One Law LLP; Peter Cheese, CEO, Chartered Institute or Personnel and Development.

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.

3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 14 days of receipt.

Examination of witnesses

Ijeoma Omambala, Akua Reindorf and Professor Robert Wintemute.

Q52 **Chair:** Good afternoon and welcome to today's meeting of the Joint Committee on Human Rights. We are a cross-party committee, and a Joint Committee, which means that we have members from both the House of Commons and the House of Lords. Today, we are holding the final evidence session of our inquiry into human rights at work, and we have two panels of witnesses.

In our first panel, we will be questioning our witnesses on the role of Articles 9 and 10 of the European Convention on Human Rights in the context of the workplace. Those protect freedom of thought, conscience and religion, and freedom of expression, respectively. In our second panel, we will be examining the legal responsibilities of employers in protecting their workers' human rights more generally, under both the ECHR and the UK's domestic legal framework.

It gives me great pleasure to introduce our first panel. In no particular order, we have Ijeoma Omambala KC, who is a barrister at Old Square Chambers. She was called to the Bar in 1989 and took Silk in 2020. She specialises in employment law, industrial action, professional regulation, and public law. She is the vice-chair of the Employment Law Bar Association, and a member of the Employment Law Association and the Association of Regulatory and Disciplinary Lawyers. We are delighted to have you with us this afternoon.

Next, we have Akua Reindorf KC, who is a barrister at Cloisters Chambers. She was called to the Bar in 1999 and took Silk this year. She specialises in discrimination and equality, employment law and human rights. She has particular expertise in the higher education sector. She was awarded Chambers and Partners' Employment Junior of the Year this year, and was appointed as a commissioner of the Equality and Human Rights Commission in 2021 and as a fee-paid employment judge in 2020.

Thirdly, but certainly not least, we have Professor Robert Wintemute, who is professor of human rights law at King's College London. He joined the Dickson Poon School of Law in 1991, after practising as an associate in the bankruptcy department of a major New York firm. In 1978, he completed a BA in economics at the University of Alberta. In 1982, he earned his LLB in common law and BCL in Quebec civil law in the national programme at McGill University. In 1993, he was awarded his DPhil by the University of Oxford. His special interests lie in human rights law, anti-discrimination law, European Union law, and sexual orientation and the law. We are very grateful to all three of you for joining us this afternoon.

I will start with a general scene-setting question, and perhaps direct that to Ijeoma in the first instance. Let us look at the actual terms of Articles 9 and 10. Article 9 of the ECHR provides that everyone has the right to freedom of thought, conscience and religion, and Article 10 protects freedom of expression. Ijeoma, could you start by giving us an overview

of the relevance of Articles 9 and 10 in the workplace?

Ijeoma Omambala: In the UK, particularly in England and Wales, Articles 9 and 10 are influential primarily in so far as they inform the interpretation applied to the Equality Act and its provisions—in particular, the provisions of Section 10, which relate to the protected characteristic of religion and belief.

Articles 9 and 10 impact in two ways. First, as a result of the Human Rights Act, there is a general obligation on all courts and tribunals to interpret legislation in accordance with European Court jurisprudence on human rights, so there is an interpretative influence.

On the way in which the case law has developed, courts and tribunals, in applying Section 10 of the Equality Act, look to European Court jurisprudence to understand what religion and belief mean in the context of employment disputes. In a very high-level way, those are the two ways in which the convention articles impact on UK employment cases.

Chair: Could you give us a practical example of a case where that has happened? Before I ask you to do that, I need to be clear that, because of the sub judice rules, we cannot refer to any cases that are sub judice, which are ongoing. There have been a couple of high-profile cases in this area recently that are finished. Perhaps you could refer to one of those and give us an example of how the Equality Act interacted with Articles 9 and 10. I am thinking about anti-discrimination law.

Ijeoma Omambala: Yes, I will be slightly historical, because I am not entirely clear whether the cases I have in mind have finished. Where, for example, an employee expresses views in the workplace that are described as gender-critical and others take objection to the way in which those views are expressed, or indeed the content of those views, that can give rise to employment law disputes, discrimination claims, under the Equality Act. There, the court is essentially charged, first, with identifying the belief that is said to warrant protection under the Equality Act provisions.

So the court does have a role, and the appellate courts have confirmed that tribunals and courts must identify the core elements of any belief that are said to attract protection. Then, having identified those core elements, it is for the court to decide whether in any particular case an individual has been treated less favourably or differently because they hold or have shared those beliefs or perhaps have had a requirement applied to them on how they communicate those beliefs, which might be indirectly discriminatory. That is one situation.

Historically, one quite often saw this clash of rights with employees who held strong religious beliefs. There was a spate of cases involving evangelical Christians, for example—I am thinking of a couple of cases that involved social workers and those in the healthcare professions—who engaged in conversations with patients and service users where they sought to discuss their religious beliefs, proselytise, convert people who

perhaps had things on their mind other than religion. Those individuals were disciplined by their employers and sought to rely on Equality Act protections and human rights protections under Articles 9 and 10 in order to resist claims that they had acted unlawfully.

Baroness Meyer: And they lost?

Ijeoma Omambala: They lost. Generally speaking, the courts approach these cases, first, by asking whether the right is engaged, whether the employees are relying on a recognised religious faith or philosophical belief. If those rights are engaged, has there been an interference with those rights? Is that interference in accordance with law? Is it prescribed by law? Is it necessary and proportionate, in the sense that it is directed to a legitimate aim on the part of the employer?

In those cases, the employers will generally say that they are seeking to enable their services to be enjoyed by everybody, regardless of protected characteristics. In so doing, they have certain rules in place about how employees should conduct themselves—conduct rules and discipline rules—and they say that those rules are a proportionate and appropriate restriction on an individual's right to manifest their religious beliefs. Generally speaking, the courts have tended to accept that that level of restriction is appropriate, given those stated aims.

Chair: There was the case of the British Airways employee who was wearing a crucifix. Can you tell us about that case?

Ijeoma Omambala: Eweida, yes. That was an employee who wished to wear a cross at work. Her employer, British Airways, had a policy in place that did not allow, I think, the wearing of any religious regalia—for want of a better expression—as part of its uniform policy. So its stance was that she was acting in breach of the uniform policy. Her contention was that the policy prevented her from manifesting her religious belief, so she had to argue that it was somehow a tenet of her faith that she wore a cross or a crucifix during her daily life.

That case went all the way to the European Court to consider, first, the scope of her Article 9 rights to uphold and to manifest her religious beliefs. The European Court again reiterated the legitimacy of limiting the manifestation of religious belief in certain circumstances: where the limitations are prescribed by law, where they are in furtherance of legitimate aims, and where there is an appropriate balancing of the individual's needs and rights against the aims and objectives of the employer. In that case, the court was satisfied, first, that it was for the national courts to say anyway where the balance lay—there was a margin of appreciation for nation states and for the courts in those states to decide where the line should be drawn—and, provided that an appropriate balancing exercise undertaken, the restrictions imposed were legitimate and acceptable. In that case, there was held to be no breach of Ms Eweida’s Article 9 rights.

Chair: At this stage, we are very much just looking for an overview of

the relevance of Articles 9 and 10 to the workplace. That has been very helpful. Robert, would you like to add anything, and then Akua?

Professor Robert Wintemute: Yes. The first thing I would like to point out is there is a difference between public sector workers and private sector workers. If you are in the public sector, you can rely on the Human Rights Act 1998, or the Equality Act 2010, or both. If you are a private sector worker, you can rely on the Equality Act 2010. This makes a difference, because in the public sector, if it is really a political opinion that you have expressed, you do not need to get into technicalities about whether it can be considered a philosophical belief: you go straight to Article 10. An interesting example of this was the case of Ngole v University of Sheffield, where a student posted remarks critical of same-sex marriage on Facebook and was later removed from his course because he offended some students who had read them.

When I wrote a comment for the *Industrial Law Journal* about the Ngole and Forstater cases, I saw a great similarity between them. The question was: have your outside-of-work comments expressing your opinion had any effect on the workplace? The Ngole case was decided under Article 10 of the Human Rights Act; the Equality Act did not come into it. Forstater was decided under the Equality Act using belief—philosophical belief, gender-critical beliefs. As for the Eweida case, which went to the European Court of Human Rights—

Chair: That is the British Airways case.

Professor Robert Wintemute: British Airways, yes. To be honest, when I heard about this case on the radio in the morning, I could not believe that British Airways had done this, because they allowed check-in agents to wear Jewish skull caps, Muslim hijabs, Sikh turbans, and here was a woman who wanted to wear a Christian cross. It seemed to be an open-and-shut case of direct discrimination based on religion, not indirect. Somehow the employment tribunal rejected both direct and indirect, and eventually she lost in the Court of Appeal. It ended up in the European Court of Human Rights, where she won. It was an obvious, easy case from day one.

It is a rare case that ends up in the European Court of Human Rights; on the whole, the tribunals and courts are getting it right. If you compare religious clothing and symbols in the UK versus France, it is night and day; there is tremendous tolerance in this country, which is a very good thing.

We will talk about this more. Overall, the protection is very good under the Human Rights Act and the Equality Act, but some cases could fall through the cracks and end up in Strasbourg, and we can think about ways to prevent that.

Chair: The lady with the crucifix ultimately won in Strasbourg.

Professor Robert Wintemute: Yes.

Chair: On what basis?

Professor Robert Wintemute: On Article 9, the right to manifest her religion in the workplace. The British Airways argument was, basically, that its corporate image was affected by this, but not by other religious clothing or symbols, which made no sense at all.

Chair: How was she able to rely on Article 9 when British Airways is a private company?

Professor Robert Wintemute: That is a very good point, which I always discuss with my students in anti-discrimination law. Some cases in the UK start as horizontal cases—individual versus private company—under the Equality Act or prior legislation. Then, when they lose in the UK, it becomes a vertical case against the UK Government, and you are arguing that the UK legal system has failed to protect you. You cannot take a case against a private company in Strasbourg; it is against the UK Government. It was not a breach of a negative obligation of the UK; the UK had not discriminated against her. It was a positive obligation: the UK courts had failed to protect her rights.

Chair: That is very interesting, thank you. Akua.

Akua Reindorf: Thank you. Hello everybody. I am very grateful to Ijeoma and Robert for that really helpful legal summary.

To address your question, Chair, I would like to talk about the recent spate of philosophical belief cases that we have had, including the Forstater case, in which Maya Forstater argued that gender-critical beliefs were protected beliefs under Section 10 of the Equality Act. She ultimately won, and the case established an authority in the Employment Appeal Tribunal to that effect.

There have been a variety of cases recently: we have had Higgs v Farmor's School, which was along vaguely similar lines. There is a bit of an explosion in philosophical belief cases, this having been the poor cousin of the protected characteristics up to now. I am finding that, in practice, employers are finding it very difficult to understand how to balance their obligations to not discriminate against people because of their philosophical beliefs, which are not religious beliefs and can be very political, and at the same time protect other people from what is regarded as harassment. That seems to me to be the real flashpoint, currently.

There are a lot of cases that have been decided—I will not refer to any that are ongoing, but there are plenty that are ongoing—in which a person is on Twitter or X, or whatever it is now called, expressing beliefs about sex and gender, or anti-Semitism. Israel and Palestine is a very big one, obviously, in the awful circumstances we are currently in. I have already had to advise on that a couple of times in the last week.

The question is how to achieve the balance. On the one hand, people are expressing their beliefs outside the workplace on a Twitter account, which

is not a work account, and are being accused of harassment by their colleagues or by students in their universities, or whatever it is, in relation to the way in which they have expressed themselves or what they have said.

Both sets of people have rights to fall back on. The people who are expressing their views on Twitter have their Article 9 and 10 rights to rely on, mediated through Section 10 of the Equality Act. Ijeoma has given you an expert analysis of how that works, but it is not straightforward. It is certainly not straightforward for employers, who cannot be expected to understand the indirect way in which convention rights filter down to workplace relations.

On the other hand, there is the right not to suffer harassment in the workplace, which is wildly misunderstood by a lot of people, not least because there is a widespread misapprehension that somebody suffers from harassment if they themselves subjectively consider that they have. There is this erroneous view that harassment is a subjective experience, which it is not; there is a very nuanced and complex objective test. There are various ways to navigate through the course of action, but, either way, there is an objective test. These things are very difficult, and it is very hard for employers to find that balance, to understand which set of rights they need to uphold or how to find their way through it. These are the sorts of matters that are resulting in very protracted and difficult internal procedures. It is great for us, because I get called in to do the internal investigation, but it really should be capable of being done internally, and it is not.

Q53 **Chair:** That leads me to my next question, and I will stick with you for the moment, Akua. You are describing a situation that is potentially quite difficult for employers to navigate their way through because of the complexity of the law and the indirect impact of the Human Rights Act on domestic legislation, particularly in relationships with private employers, rather than the public sector. What guidance is out there for employers to help them understand how to protect the rights of their workers under Article 9 and Article 10, which is what we are focused on today, and is that guidance adequate?

Akua Reindorf: I sit on the Equality and Human Rights Commission, but I am not here in that capacity; I am here as a barrister. I have looked at the guidance that is produced by the commission, which consists of quite a number of largely out-of-date and disparate bits and pieces. There are some pages on human rights and some guidance on human rights in the workplace, which is quite old.

Then there is the employment statutory code of practice, which tribunals have to take into account when they are hearing employment cases, and that has not been updated since 2011. There are plans to update it only in relation to the worker protection Bill and amendments to the Equality Act. Beyond that, there is no plan to update it, but the code of practice for goods and services, which is the companion piece, is being updated. A very thorough job is being done on that, so, at the moment, that is

where the bandwidth is. Apart from that, it is not great, but this is a fast-moving area of law; it has come up really in the last few years, and it is pretty hard to keep abreast of.

Chair: Do you know what the EHRC's plans are in relation to updating?

Akua Reindorf: Only what I have just said: there are no plans to update it beyond the worker protection Bill amendments.

Chair: Does any other guidance exist independently of EHRC from outside bodies? Ijeoma, would you like to take that?

Ijeoma Omambala: Akua is right about the commission's guidance. There is also guidance provided by ACAS, which is the most recent guidance. It is called the *Guide to Religion or Belief Discrimination: Key Points for the Workplace*, and it was produced in 2018. I should say that I am a council member of ACAS, but I am not here in that capacity. It is a slightly more expansive document, and, anecdotally, it is considered to be useful for employers, primarily because it gives concrete examples of particular workplace situations and how they might be addressed. Some of you may be familiar with other ACAS guides in other areas, but it is in a similar style, and it walks employers through the law, what the law means, and some practical examples of how that might be applied and how issues might be addressed. However, as I say, that is also quite out of date.

Aside from that, some trade unions provide booklets for their members, but there is nothing else that is generally accessible.

Chair: What about outside organisations that provide equality and diversity advice and training? This is quite important, because some of those who submitted written evidence to us suggest that some organisations have provided equality and diversity advice and training that may not accurately reflect equality law and, indeed, human rights. Ijeoma, do you want to answer that? I see Akua has put her hand up.

Ijeoma Omambala: No, that is fine.

Akua Reindorf: I am happy to take that; it is my pet subject. A couple of years ago, I did a piece of work that was published for a report for Essex University. In shorthand, it was on the cancellation of a couple of visiting speakers who had gender-critical views. Its internal documents and policies had been examined on a yearly basis by Stonewall, and I found they were inaccurate and made a comment about it being surprising. That is not the first time I have come across that. It is not just Stonewall, there are various outside organisations.

One of the difficulties is there are a number of special interest groups in this space that operate workplace schemes, like Stonewall, where you get a badge for your website if you do things in the way they suggest. In the higher education workplace, this is particularly prevalent. These are single-interest groups, so they very often recommend going beyond the law in one particular direction without really thinking about how that

affects the delicate ecosystem of the rest of the Equality Act, which it does and can do. I have seen a lot of egregious examples of this, and I have seen some very poor internal policies and procedures. This is on a slightly different subject, but a lot of internal policies and procedures do not distinguish between religion and belief; they do not realise that it goes beyond religion.

Chair: Thank you. That is very helpful.

Q54 **Lord Henley:** The Chair has been asking you about guidance for employers, and you have described the law; Akua said it was not straightforward, that it was nuanced and difficult to assess, and we have a sense of that. There is guidance from the EHRC from 2011, and you mentioned further guidance, from ACAS in about 2018 and from various trade unions. Is there anything specifically designed for employees, or is what we have in this area inadequate?

Ijeoma Omambala: Can I make some observations about that? The difficulty with guidance is that the focus is quite different depending on the audience. There is some specifically employee-focused guidance; I indicated that some trade unions, for example, produce that. The TUC also produces some material that relates to this area.

It is difficult to produce accurate guidance that properly reflects the complexities of the law that is also accessible. There is a tension between accessibility and comprehension and the level of detail that employers, for example, need in order to ensure that their organisations are working appropriately and that they are providing adequate protection for the rights of their employers. It is a very difficult area, and, as Akua said, the focus of interest has changed over time.

As I said earlier, initially the clashes arose in relation to conflicts between religious belief and sexual orientation. Then it was evangelical Christians and same-sex relationships, and now we are in a time where gender-critical beliefs are in the spotlight. The development of the case law shows that this is a dynamic area, as Akua says, and it is important to have guidance that appropriately reflects the principles that are engaged, rather than focusing on a particular topic, interest group or area of interest. Otherwise, the guidance quickly becomes outdated, not useful, and sometimes positively harmful.

Lord Henley: It would be even harder to get it right for guidance for employees than for employers.

Akua Reindorf: The EHRC guidance is meant to be accessible to both employees and employers.

Lord Henley: But, as you said, it is 12 years old, and things have moved on.

Akua Reindorf: It is still good guidance, and it is still statutory guidance, so it is not to be ignored by any means, but, yes, a lot has happened since then.

Lord Alton of Liverpool: Akua, I was very interested in the distinction you drew a few moments ago between religion and belief. Article 18 of the UDHR is very specific about religion and belief—or, indeed, about no belief. I am interested to know what domestic law does and what mechanisms are in place to respect and uphold the position of people who are caught in any of those traps. By example, I met a Scottish midwife who lost her job because she did not want to be involved in the commissioning of abortion. The tribunal, of course, held against her in the end, and she and her companion lost their jobs as a consequence. Are the mechanisms sufficient for someone in that kind of position to be able to explain what their beliefs and their conscience tells them?

Akua Reindorf: It certainly should be, but it will depend. Section 10 of the Equality Act is capable of encompassing people who have religions—established religion, religious belief—or people who have a philosophical belief, which can be a very broad thing, like belief in climate change, belief in communism, belief in gender-critical views, et cetera. I am sure being pro-life would fall into the same category, although do not quote me on that.

As you mentioned, it also covers lack of belief, so you can bring a claim on the basis that you were discriminated against because you do not believe in a particular thing, but that particular thing has to be a philosophical belief for the purposes of the Act. Whether it is acceptable for your employer to subject you to a detriment because of that is a different question; it will depend on the work and what is necessary for your work.

With Mrs Ladele, who was supposed to be marrying people as a registrar, the circumstances of the job had to be taken into account, whereas Mrs Eweida was just wearing a little cross when other people had their religious symbols. The proportionality exercise that has to be applied takes into account a very wide range of circumstances and is a very nuanced analysis. It will have different outcomes in different cases, so it is impossible to say.

A midwife should not be made to be involved in conducting abortions. It is impossible to say what the outcome would have been had you had a different judge on a different day.

Ijeoma Omambala: How an individual articulates their belief, or lack of belief, is crucial. It can be the difference between winning or losing their case, because that is the starting point. You identify the belief or the lack of belief, and then the court or tribunal has to consider, in a direct discrimination case, whether you were treated in the way that you are complaining about because of the belief just identified.

A difference in the way you articulate the belief can affect your prospects of going on to prove your case. We spend quite a lot of time in the employment tribunals and in the courts articulating the belief, when the focus in most cases is on the reason for the treatment that you are complaining about. There is a risk of too much emphasis being put on a

generic sense of whether it is a belief or a religion and not enough emphasis on the reason for the way you have been treated.

Q55 **Lord Alton of Liverpool:** Thinking about Articles 9 and 10 of the ECHR, are there any improvements we should be making to domestic law and the mechanisms in order to do the things you have just said? Perhaps Professor Wintemute would like to come in on that as well.

Professor Robert Wintemute: Thank you for your question. We need to take a look at inconsistencies in UK law, of which there have been many over time, especially in anti-discrimination law. It was legal to discriminate on the basis of religion in Great Britain for many, many years. It was also legal to discriminate on the basis of race in Northern Ireland, and it took a long time before that was fixed.

At the moment, the anomaly is that we have a prohibition of discrimination based on political opinion in Northern Ireland, but that does not appear in the Equality Act, although, because of the Redfearn v United Kingdom judgment of the European Court of Human Rights, we were forced to create a category of unfair dismissal based on political opinions or affiliations, which was an exemption from the minimum employment requirement before bringing the claim of unfair dismissal.

That is partial protection, but that could easily be made more general in the Equality Act. That would really solve the problem of what a philosophical belief is. You will find the phrase "religion or belief" in Article 9.1 of the European Convention on Human Rights back in 1950, but it was inserted in the context of conscience and religion, so they had in mind conscientious belief; the EU directive referred to religion or belief. When the UK implemented it, we said "religious or philosophical belief", and that has been the debate ever since: what is philosophical?

I would say that any political opinion can be shoehorned into a philosophical belief, and this is where we risk having cases fall through the cracks and ending up in the European Court of Human Rights' failure to protect an Article 10 freedom of expression right. It would be better and would offer more general protection if we just inserted political opinion as a protected characteristic. I was just thinking today about whether that requires any additional exceptions. I do not think so, because we do not have any special ones for religion or belief. Basically, if it affects your ability to do your job, that would be an exception that would apply.

Returning to the Ngole and Forstater cases, the question is how it has affected the workplace. In the Ngole case, it was a university and he was not actually an employee. He proposed comments on Facebook that some people found offensive, but he did not repeat them in the classroom; he in no way discriminated against anyone.

The same was true in the Forstater case. The employment judge assumed that she would necessarily harass a transgender co-worker because of her beliefs, but this had never happened; she did not have

any transgender co-workers, so that always has to be borne in mind by the employee expressing the belief. There is a huge difference between posting to Facebook or tweeting and expressing your opinions to your co-worker at the next desk. That is where a harassment situation could arise: if you are forcing your opinion on someone else.

Chair: So if somebody was sacked and was told by their employer, "I'm sacking you because you are a member of the Labour Party", in order to get an anti-discrimination claim, they would need to shoehorn that into philosophical belief. Is that right? You are suggesting that perhaps political opinion should be separate. Please tell me if I have this wrong.

Akua Reindorf: Party politics does not count. Party politics does not come into it.

Chair: Could you not shoehorn that into philosophical belief?

Ijeoma Omambala: You could, because Section 10 deals with religion or belief, and belief is sufficiently broad and expansive in scope. There are criteria for your belief to be judged by, but you have to demonstrate, for example, that the belief you hold informs the way you live your life. A passing reference to the Labour Party probably would not amount to a belief protected by Section 10, but lifelong membership and periodic campaigning or activity in local politics would probably be sufficient to establish the necessary belief.

Akua Reindorf: Sorry, just to jump in there—

Chair: I do not want to open up a rabbit hole here, but quickly, Akua.

Akua Reindorf: The difference is that you have to show a belief rather than an allegiance. If you were to say, "I'm a socialist, and I have a lifelong belief in socialism", then fine; that would probably work. There has been a case on communism where somebody was found to have a protected belief, but saying, "I'm a member of a political party", would probably not do it.

On Rob's point on political opinion, I am not convinced that would be a good protected characteristic, but, as far as I am aware, in Northern Ireland, they have political affiliation as a protected characteristic.

Baroness Kennedy of The Shaws: You will remember that during the height of the pandemic there was great debate about workers in the National Health Service who might be refusing to accept the inoculation against Covid for themselves. There was great concern that there was an anti-vax group of people who were not prepared to take a vaccination and therefore might be much more likely to have an impact on the patients they were caring for. The unions and so on sought to hose that down by getting people to generally agree or move people away from particular roles, but if someone was sacked because they said, "I do not believe in vaccination"—

Baroness Meyer: They should not be in a hospital.

Baroness Kennedy of The Shaws: That is runnable.

Ijeoma Omambala: Yes, and there have been cases at first instance in those sorts of circumstances where individuals have refused the Covid vaccine and therefore have not been able to return to the workplace, because it is a requirement of their work to be vaccinated. Those cases have been brought, but they have not been run on the basis that they are anti-vaxxers. Because lawyers are involved, there is a rather more nuanced argument as to what the belief system might be, but it is perfectly possible to run those claims. Ultimately, whether that individual wins or loses depends on the evidence they can pull together to demonstrate that, whatever their employer might say, the real reason was their belief.

Akua Reindorf: This really illustrates the difficulty with these cases once you get into tribunal or court, because the real focus on a case like that will be on whether it was legitimate for the employer to exclude the person from the workplace. The employee will be wanting to make their anti-vax arguments at length before the tribunal, and the employer will then be arguing about why vaccinations are appropriate, so you end up having a political debate in tribunal.

A lot of these cases get sucked down that rabbit hole at first instance, such as Forstater. The Forstater EAT judgment started with a full page on how they were not getting sucked into it, and it was like a disclaimer that they did not have any opinion on it. These sorts of cases are a very good platform for activists, but it is very difficult for judges to navigate their way through without coming down one side or the other. In my view, in the end, there is no way out for the judges but to do that.

Ijeoma Omambala: There is a Supreme Court authority that says that it is the job of judges to make these difficult decisions. They have to carry out an evaluation exercise, weigh the evidence, and, ultimately, decide whether an interference with a fundamental right is justified, so acknowledging the difficulty of the task, but saying to judges, "You cannot shirk it. You must do it".

The way the law has developed requires that assessment in many cases. It requires what we lawyers describe as a proportionality assessment: weighing the arguments on the one side and the arguments on the other, looking to the employer to say, "Why did you do this thing?" In the hospital example, it was necessary that staff members were vaccinated in order to provide protection for patients. That is the legitimate aim that the employer has identified.

The question then is whether it is justified. Is it an appropriate and proportionate response to say to this employee, "If you don't have your vaccination, we'll dismiss you", or, "We'll remove you from your job"? It is a very difficult evaluative exercise, and the cases that are brought generally have to engage with that challenge.

Chair: If JAG Griffith was still alive, he would be having a field day with

the politics of the judiciary in this area, because value judgments are being made.

Ijeoma Omambala: Absolutely, although, again, in the jurisprudence, it is often repeated. It is not for the courts or tribunal to comment on or assess the merits of a belief or the credibility of a belief; it is simply to identify whether it exists in accordance with specific criteria. But there is necessarily a value judgment and some kind of subjective exercise.

Akua Reindorf: Yes, at the next stage.

Professor Robert Wintemute: I could refer the committee to a 2014 article in the *Modern Law Review*, which I published, called *Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others*. That is the overarching question: is there any harm to others? That is what distinguishes skullcaps, hijabs, turbans and crosses from non-refusal to get vaccinated when you may pass on a virus to a patient.

Chair: The harm test. We will make sure that our team get the citation for that journal article.

Lord Alton of Liverpool: Chair, that was a very good excursion down the rabbit hole. Thank you very much. Given that one of the tasks of the committee is to make recommendations for improvements about the mechanisms, we would be very open to having afterwards, in writing to the committee, any further thoughts on what improvements might be made.

Chair: We are already hearing that we need updated guidance, but I suppose David's question was more whether the law itself and whether the mechanisms where people protect their rights need to change.

Akua Reindorf: At the moment, Parliament is pulling in different directions on this. We have had the Higher Education (Freedom of Speech) Act. In my view, something was needed in that space, certainly in higher education. Whether this is the right Act or not, we will see.

At the same time, we have the Online Safety Act and the worker protection Bill, which seem to be pulling the other way. I currently cannot really see a way to improve the Equality Act on this point. Bear in mind also that it is not just the Equality Act that has to be interpreted compliantly with the convention but the Employment Rights Act; unfair dismissal may well come into that. I do not think there is much you can do. Education is the key. Perhaps you can abolish social media, because that is where it all happens.

Lord Alton of Liverpool: You have the unanimous support of most of this committee.

Chair: I would agree with that.

Q56 **Lord Dholakia:** A reply to the Chair's question suggested that limited

help could be available from bodies like ACAS or trade unions. What further things could we do to support the employers about the rights of workers under Articles 9 and 10?

Ijeoma Omambala: My honest reflection in response to that question is that it is part of a broader problem of access to justice, so it is about resources. There have been suggestions that a trusted online resource be created where materials such as guidance on religion and belief as well as other employment-related matters might be available, and perhaps increased use of early dispute resolution in these cases, so that where a problem arises, employers have somewhere to go to get early, accurate advice and assistance in resolving those disputes before they are taken outside into the sphere of litigation, whether that is in the tribunal or elsewhere.

It is a broader response than what can we do here and now. There are always difficulties in ensuring the accuracy and the appropriateness of the advice that is being given, and the question is: who provides that advice? There are diminishing sources of advice. Historically, law centres and advice bureaus would have been the obvious and first port of calls, but they are under enormous pressure, and, in a practical sense, it is difficult to identify where people should go.

Akua Reindorf: Some grass-roots organisations to which people can go in relation to sex and gender are springing up, certainly in the gender-critical area, and they are extremely efficient, but that is very patchy coverage. The much harder, current area of dispute is the Israel-Palestine situation; I struggle to think of where a person might go for advice on how to exercise their right to work in relation to that.

Lord Dholakia: Professor Robert, any further thoughts?

Professor Robert Wintemute: I could make a very radical suggestion: if an employee ends up bringing a claim, there could be a change to the general costs rule in the UK. I worked in New York for five years and had experience of their general rule as the opposite, which is that each side pays its own costs, so if you bring a court case, you do not have to worry about paying the other side's costs if you lose.

I can see that might not suit the British legal system generally, but perhaps we could consider an exception for claims under the Human Rights Act and the Equality Act, which would make it easier to bring the claim. If you had a practising lawyer who was able to work pro bono, you could take the case as far as you could, and you would not have to worry, especially about paying the Government's or a large company's legal bill. That is a major deterrent. We see claimants having to raise huge amounts of money on the CrowdJustice website.

Chair: I want to bring in Baroness Kennedy, because she has an important question to ask and has another important engagement to go to. We will come back to this question of funding and early dispute resolution, but we will jump on to a different topic for now.

Q57 **Baroness Kennedy of The Shaws:** I am sorry that I am taking it out of turn, but I have to see a former Prime Minister.

I wanted to ask you about the worker protection Bill. Akua, you mentioned it, and it has come up already. It is currently before Parliament. One of the things it is doing is seeking to re-establish the employers' liability for sexual harassment of workers by third parties under the Equality Act. Do you welcome those efforts to re-establish that type of liability? Do you think that is a good thing?

Ijeoma Omambala: I think it is. I must confess that the removal of those liabilities historically was something I have never quite understood. I had a quick look at the current Bill before I came, and I am not sure what the rationale is for limiting it to the protected characteristic of sex.

In my view, it should be a liability that extends across all the protected characteristics. If there is unlawful activity by a third party, there should be liability irrespective of the protected characteristic in play, but I welcome it. There is a gap in protection at the moment, which has real practical consequences, particularly as relationships in the workplace fragment. There are lots of workplaces that are not simply made up of employers and employees; there are contractors and agency workers.

Baroness Kennedy of The Shaws: It is about sexual harassment, but do you think it should be extended to cover bullying as well?

Ijeoma Omambala: I do not think that bullying has a sufficiently precise definition in law to be of value. Harassment is a term that is sufficiently understood and would read across to the other protected characteristics to be of use.

Baroness Kennedy of The Shaws: And it is particularly on the agenda at the moment. Professor, is there anything you would like to add, or do you take the same view as Ijeoma?

Professor Robert Wintemute: Going back to the provisions in the Equality Act 2010 that were repealed, and to the House of Lords decision in Pearce in 2003, a lesbian schoolteacher was harassed by pupils. That case was rejected on the basis that they were third parties and the school could not be liable for their actions, so the House of Lords took a wrong turn on that.

Baroness Kennedy of The Shaws: So you are really taking the same position. What about the limitation to sex and all the characteristics?

Professor Robert Wintemute: If that is what it was in 2010, I would say yes, but I would have to check.

Baroness Kennedy of The Shaws: Keep it at just sex?

Professor Robert Wintemute: No. If it was across the board, it should be across the board.

Akua Reindorf: I take a different view. I am not convinced. Regarding sexual harassment, my understanding is that it is not just the protected characteristic of sex. It is the cause of action of sexual harassment, which is conduct of a sexual nature, rather than ordinary harassment related to sex, which is a different cause of action. It is that specific cause of action in the Equality Act which the amendment will make employers take action to protect employees from. When you balance the risks involved in having third-party harassment liability in relation to actual sexual harassment, which is people being subjected to sexual conduct against their will, that seems to be reasonable.

Baroness Kennedy of The Shaws: Why could the other characteristics not be included?

Akua Reindorf: My view is that extending it to ordinary harassment is difficult. I liked it when we had it before, which was evident in a case called Burton v De Vere Hotels.

Baroness Kennedy of The Shaws: What about gender, though? That is not taking it to ordinary harassment. Could the harassment not be around the characteristic of gender, which can also be of a sexual nature?

Akua Reindorf: I think I understand what you mean. Ordinary harassment is where you are subjected to harassment that relates to a protected characteristic rather than sexual misconduct, which is what sexual harassment cause of action is. We are operating in a different environment than we were when Burton v De Vere Hotels was the leading authority, where Bernard Manning had made waitresses uncomfortable and directly attacked them when they were working where he was performing.

Baroness Kennedy of The Shaws: Yes, when he was performing, and he was a comedian who made very sexually loaded jokes about women.

Akua Reindorf: Indeed. In the olden days, we were more of one mind about what amounted to harassment by third parties and what did not. I know that in this room there is personal experience of this: people working in, for example, an entertainment venue and refusing to engage with people coming into that venue as performers or as speakers who hold views that they disagree with, and we then have harassment complaints about that.

If there is third-party harassment in that environment, there is a difficulty, and it butts up against freedom of speech and freedom of belief in the real world that we live in now in a way that is complex. Although I am instinctively keen to have third-party harassment in the Equality Act, I am wary of it for those reasons.

Baroness Kennedy of The Shaws: Would anyone like to counter anything Akua has said? I see you looking rather puzzled, Professor.

Professor Robert Wintemute: I would have to go back and look at the detail of the repealed provisions, but the emphasis was on what the

employer knew and what they could have done about it. It was really a reasonable care standard, so it did not seem that onerous.

With regard to current sensitivities about being offended, I would hope that there would be a distinction between cases where the comments are directed at the employees, which I believe is the Bernard Manning situation, and where someone is just speaking.

Akua Reindorf: I would be very happy to see a provision that was tailored in that way. As I say, I am instinctively in favour of it, but I worry about the wider environment that we operate in and the freedom of speech obligations.

Baroness Kennedy of The Shaws: Might you be able to assist with some sort of draft that you would prefer to see?

Akua Reindorf: I do not know. I would have to check with the commission whether I could be involved in that.

Chair: There has been quite a lot of confusion about the Bill currently before Parliament, because Clause 1 talks about the liability of employers for general harassment and the rest of the Bill focuses on sexual harassment. I find it a little confusing.

Professor, you indicated that you might like to refresh your memory about what was originally in the Employment Act, because a provision against third-party harassment was amended out, and this Bill seeks to put it back in again.

I wonder if all three of you would mind having a look at the current Bill and what there was before, and perhaps follow up with a short letter with your views on it, because it is quite important for our purposes, particularly given the concerns you have expressed, Akua, about how it might play out in relation to freedom of belief and freedom of expression.

Akua Reindorf: The Bill clearly states that sexual harassment in subsection (1) means harassment of the kind described in Section 26(2)—in other words, unwanted conduct of a sexual nature, which is a specific cause of action. It is not ordinary harassment or harassment related to sex.

Chair: We can get a different version of the Bill, but I am pretty sure it started out as ordinary harassment, so if it is just sexual harassment alone now, I think that has been amended in. I could be wrong about that. Maybe you could have a look at that and write to us.

Professor Robert Wintemute: I took a look at the Bill this morning, and the Lords struck Clause 1 from it. I believe the Commons accepted it, and it has gone for Royal Assent.

Chair: That means that it has just gone down to sexual harassment now.

Professor Robert Wintemute: Yes. The version I saw did not seem to do very much.

Akua Reindorf: Yes. I thought it had gone for Royal Assent, as well. That was my understanding, but it is not in force.

Chair: Maybe our team could follow up with you in writing about that. Professor Wintemute, can we go back to the interesting suggestion you were making about the costs? Correct me if I am wrong, but, at the moment, if people take a cause of action for a discrimination case in the Employment Appeal Tribunal, what is the position about costs?

Ijeoma Omambala: The employment tribunal and the Employment Appeal Tribunal are no-costs jurisdictions. Unless the person bringing the claim or those representing them have acted in a way that is unreasonable in a number of varied ways, there is no order of costs. The general rule is that, win or lose, you do not pay the other side's costs; you simply bear your own.

Professor Robert Wintemute: But it may be necessary to go beyond the employment tribunal.

Ijeoma Omambala: Once you are in the Court of Appeal and the Supreme Court, those are normal costs jurisdictions, so you will be at risk of paying the other side's costs if you are unsuccessful. Although there is a costs protection regime, if you are running a case that is said to be of particular public interest, for example, or if you are an organisation that has very limited funds, you can apply for costs protection. That means that you do not have to pay any costs of the other side, or the costs you will have to pay are capped at a level that is assessed in relation to the means you have available.

Professor Robert Wintemute: But they can still be very high. The Wilkinson v Kitzinger same-sex marriage case had a protective costs order, and it was too high. They could not appeal, and that was the end of the case.

If you do not mind, I would just like to mention a case that went beyond the employment tribunal—Walker v Innospec Ltd and others. It ended in 2017 in the Supreme Court on same-sex survivors' pensions. In order to enforce your rights in a test case that will benefit other people, you need the backing of an organisation, trade union, or, in that case, the NGO, Liberty. That is how the financial risk was born.

Perhaps it would be appropriate for me to write to the Chair about this specific point, but Parliament has not complied with the Walker judgment of 2017. This comes under the heading, "Retained EU law and workers' rights". It is off topic for today's panel, but I thought I had better mention it. In 2017, the Supreme Court ruled that an exception in the Equality Act at Schedule 9(18), which allows discrimination against same-sex couples, was incompatible with EU law. The exception had to be disapplied. The problem is that we are no longer in the EU, so the

directive does not apply, but the exception is still on the statute book. I have written to the special adviser of the relevant Minister, and nothing has been done. I have now contacted four Members of the House of Lords, and nothing has been done.

Chair: Let us park that, but on the costs in this area, you were suggesting something we might do.

Professor Robert Wintemute: Yes, sorry. I was going way off-topic there. There could be an exception for claims under the Human Rights Act or the Equality Act, so the no-costs jurisdiction would extend all the way to the top. Would that make a difference today? I do not know. Practitioners might be able to say that the CrowdJustice system is working very well and important cases are getting funded, but it might help. If you have a situation where a practitioner does not need to charge you a fee and is willing to go all the way, knowing that you do not have to worry about paying the Government's costs or the costs of a large company might help the case to go forward.

Akua Reindorf: The problem with costs at the moment, certainly at the employment tribunal and Employment Appeal Tribunal levels, is how specialist the area of law is. People are having to raise a lot of money to pay very specialist solicitors and King's Counsel to represent them in this area.

One other difficulty is that the crowdfunding model is great for people who have a solicitor who is proficient at using it, but it is a very specific skill. Some people do not manage to raise the money, and it is very difficult to do it yourself because there are trips and traps for the unwary in how to best launch a crowdfund.

Chair: We are running out of time, but I just wanted to go back to the early dispute resolution that you mentioned, Ijeoma. People can go to ACAS, but are you envisaging something more than that?

Ijeoma Omambala: Not necessarily. The early conciliation process that ACAS oversees enables an individual to go to ACAS, ACAS will contact their employer and talk to them, and they will say, "There is a potential claim. Is there any room for resolution?" That exists, and it works well. It could be expanded, and there could be a greater level of expertise, input and focus on equality cases in general, and perhaps specific areas like religion and belief in particular.

Chair: Thank you very much. That has been an extremely interesting session. I will move us on to our second session now, but we are very grateful to you, and our team will follow up on one or two other points.

Examination of witnesses

Gill Hunter and Peter Cheese.

Q58 **Chair:** Good afternoon to our second panel of witnesses. Thank you for bearing with us and for joining us this afternoon. We are delighted to have you here.

First, we have Gill Hunter, who is chair of the equity commissioners at the British Chamber of Commerce, and managing partner at Square One Law LLP. We also have Peter Cheese, who is CEO of the Chartered Institute of Personnel and Development. Peter writes and speaks on the development of HR, the future of work, and the key issues of leadership, culture, organisation and people and skills.

We want to focus on the employer's point of view with you now. We have been carrying out an inquiry into rights at work, and we are keen to hear from people who have experience from the employer's perspective. Perhaps I could ask you generally what type of legal responsibilities employers have in relation to protecting the human rights of workers. Gill, I will start with you. I know it is quite a wide field.

Gill Hunter: It is, and that is part of the issue for business. There is a real jigsaw of different pieces of legislation that, if you are a business owner like me, you have to navigate your way through, and you have to work out what practically that means for you. From a business point of view, the key piece of legislation is obviously the Equality Act. It is probably also worth saying that, although the Human Rights Act and the Equality Act focus on protected characteristics, a scenario has evolved over time about creating good work, and creating a workplace that is equitable, which has brought in more than perhaps was originally intended by the legislation. Employers feel that they have to go beyond just the protected characteristics, and they are working to create workplaces that are equitable for people from all sorts of different backgrounds or with other characteristics that are not necessarily protected.

Chair: We are focused on the legal responsibilities of employers, and we have looked at a wide variety, from the right to be free from slavery and forced labour to the right to private and family life, the right to freedom of thought and belief and religion, and the right to express one's opinions. We have also been talking about the right to form and join a trade union, and the right to protection from discrimination. Have I have left anything out, from the point of view of legal responsibilities as opposed to what we might call good practice?

Peter Cheese: I would add data protection and privacy.

Chair: Data protection is massive. What was the other thing?

Peter Cheese: Data protection and privacy, and GDPR, but I agree with Gill that it is quite a jigsaw of different pieces of legislation.

We do a lot of training and guidance in the world of work, and the most popular courses that we run are always about legislation and trying to understand the basics. For smaller employers in particular, it is very challenging. We look at this as a wraparound, understanding that it is not

just a legal obligation but a moral and ethical obligation for companies to look after their people properly; it is a duty of care. It also relates, therefore, to things like board governance and oversight, and the importance of boards understanding the culture of the organisations that they oversee.

The Financial Reporting Council has gone through quite a lot of reviews and consultation on things like the company codes. In fact, a lot of it was already in there, such as the importance of a board understanding the culture of the business that it is overseeing. The way people are treated in the workplace has an underlying legislative basis, of course, but a lot of it comes down to culture and the ways in which people behave within organisations, how people's voices are heard, and all those sorts of things, so corporate governance has to sit alongside that.

I have been around the world of business for quite a long time, and, certainly in my experience, there is change going on. There is no doubt about that. A lot of it is driven by social change. The expectation of people coming to the workplace today is very different from my generation. People expect their voice to be heard, and they are much less tolerant of poor behaviour, and so they should be. There are many more channels by which they can have their voices heard and raise concerns, and those are all mechanisms that sit alongside legislation, as well as things like corporate governance.

Q59 **Lord Henley:** You heard discussion earlier about support for employees, and for employers in helping them to discharge their legal responsibilities in relation to these two articles, and you heard about the guidance that is available from the Equality and Human Rights Commission dating from, I think, 2011. Could there be more guidance? Could there be better guidance? Should we be asking it to update that guidance, and do employers need more help in this complicated field?

Gill Hunter: Yes. There is a huge amount of guidance out there. Some of it is very good in that it gives practical examples, which is what businesses need; they need specifics that they can relate to. A lot of it, however, is very outdated. Particularly post Covid, where we are now in a world of flexible working and remote working, things are very different. We also have very different ways of working. Not everybody is an employee. We have workers, we have employees, we have consultants, and this whole patchwork needs to be brought together and reflected in the guidance.

I am never one for promoting more words and more documents, but there needs to be a consolidation of what there is and very clear guidelines, because at the moment businesses will go to people like the CIPD or to the British Chambers of Commerce to ask for guidance. There is clearly something not right with the guidance that is there at the moment, otherwise they would be using it.

Peter Cheese: Yes, I think that is right. ACAS, of course, is another source of guidance.

Going back to smaller businesses, in our experience they often do not know where to go. As we know, many issues arise in small businesses not because they are bad but because they do not understand. When they do not understand, where do they go to ask the questions?

We ran a series of pilots over the last year in three different councils in three different regions providing basic HR support direct to small businesses. It was really interesting to observe that the channels by which those connections were made varied. Sometimes it was the council, sometimes the local enterprise partnership, sometimes the British Chambers of Commerce.

When we talk about things like longer-term national productivity, we have a long tail of businesses. How you get to them and support them. That is a really important question. I think we agree that guidance is essential. There is a lot of guidance out there, but it is also about how you communicate that effectively, and the right channels for doing that.

Chair: Do you think it is important to have a source of guidance that is authoritative, and that states the law correctly? That seems to me to be the function of the EHRC.

Peter Cheese: It is, but building on the EHRC, there are professional bodies like the CIPD and ACAS. A very important part of what we believe is that you have to be a trusted source of guidance. You have to have legal guidance, but, as I touched on in my earlier remarks, it is not just about the basis of law but about the other things that wrap around the basis of law that create healthy workplaces, and speak-up cultures, and all the other things that we are talking about today.

Q60 **Baroness Lawrence of Clarendon:** Do you think the balance is being struck between employers and workers in the use of surveillance in the workplace, for instance, in monitoring the performance of employees working remotely? I am not sure how you would monitor remote working.

Peter Cheese: It is an important point. Because of the different ways of working, employers have shown a greater interest in understanding what people are doing. In most office products that we all regularly use these days, you can track almost anything: the number of keystrokes, how long somebody is on a particular platform or application, who they are emailing—all these sorts of questions.

Does that tell you how they are performing? Does it tell you what they are producing? No, it does not. In some cases, you are trying to monitor where people are spending time and whether it is billable, for example. But there is another side of this debate that is important from an employer's perspective. Employers are also trying to manage risk. It is not just about managing or over-surveilling and monitoring their people. They have to manage risk as well, and one of the most profound risks in business today is cybersecurity. They need to understand whether people are accessing the right things, and to put controls in place to make sure that they are not doing anything dumb. The balance is really important,

so with any monitoring there are some very important principles. In fact, the ICO has just produced some new guidance on this.

The principles are fairly self-evident. You have to be transparent. You have to be clear about what you are monitoring and why you are monitoring it, what resulting information you are using, and that you are not contravening people's individual privacy and rights in that regard. Those principles are not always well enough understood, and because the technology is so freely available, companies can find themselves just using information without being clear about its purpose and the principles of transparency and so on. It is a fast-emerging area, for sure.

Gill Hunter: I would agree wholeheartedly. The ICO has been very good at issuing guidance on privacy issues that is easily digestible for business, and there has been an employer's code of practice on employee monitoring for a long time, which is good. But the problem for employers now is the technology. A lot of the time, employers are not even aware that they are monitoring or have the capability to monitor.

There are certain circumstances in which you need to be able to monitor employees. The classic example is long-distance drivers and having something that monitors whether they are taking the appropriate rest breaks. That is for safety reasons. The more concerning type is monitoring for monitoring's sake without any real purpose behind it. The important thing is that there is balance and that employers acknowledge that if they are going to undertake monitoring they have to be very clear with their employees about why and how and what that information will be used for.

Chair: I suppose it is important to be clear why you are doing it in order to justify doing it at all. Also, I imagine that if you explain to your employee why you are doing it, there is more chance of not damaging the relationship of trust and confidence between employer and employee.

Q61 **Baroness Meyer:** Talking about balances, is the balance right under UK law between employers and workers? Also, do you think that the Strikes (Minimum Service Levels) Act, which seeks to impose a minimum level of service during strike action, will bring the right balance between workers and employers, or is it excessive?

Peter Cheese: As a general observation, it would not surprise you if I said that employers are not generally arguing for more regulation or legislation. In my experience, and having worked in other jurisdictions as well, the UK does not have a bad balance between the rights of employers and employees. It is important to have a balance. Many employers point to other European countries, for example, and say that they are overregulated and on the side of the employee. On the other hand, you can look at markets like the United States, which, I would probably argue, are a bit too much in the favour of the employer. So the balance is a really important point.

As to your second question on minimum service levels and things like that, the danger is that it starts to create even more conflict. We have had fairly balanced industrial relations for quite some time. Obviously, recent events and the cost-of-living crisis have created more industrial action, but enforcing additional legislation on minimum service levels is difficult to do. It would take a long time to agree what those were. Again, it starts to create more conflict and tension at a point when, notwithstanding the current challenges, we have made progress in the workplace on industrial relations. Some organisations have agreed voluntary service levels, for example, rather than having them mandated and enforced.

It is very important that we keep moving forward in this country on the relationship between unions and workforce representation and employers, and so forth, and that we work together on shared agendas without creating further tension and conflict.

Baroness Meyer: In your opinion, would a system like the one in Germany, where there is much more negotiation, be better?

Peter Cheese: Yes. Other interesting things in Germany are workers' representation and workers' councils, which brings me back to the wider governance points. Governance that gives a voice to all the different stakeholders in an organisation, including employees and the workforce, is a good thing. It is not a perfect system, but I do not think there is a perfect system. As you know, Germany has had challenges too.

It is always true that we can learn from other countries, but as I have said, broadly speaking, employers feel that the UK does not have a bad balance. It gives enough protection to employees, by and large, particularly if you wrap up the other things I talked about, while also giving employers enough flexibility in how they manage their businesses, particularly at times of great change.

Baroness Meyer: Would you agree with all this, Gill?

Gill Hunter: Yes. Obviously, a lot of this legislation is aimed at the public sector. Employers generally do not like to have overregulation, but you can see how some employers would think it was attractive to be able to force people to work, particularly if the alternative is hiring expensive contractors to carry out those essential functions. However, at the moment, the tightrope between employee and employer is fairly fragile, and anything where employers are seen to be imposing service levels on employees runs the risk that we disrupt what is already quite a fragile relationship, particularly at a point in time when we have skills shortages across the board in most sectors and most business areas.

Baroness Meyer: Would you apply that to the health service as well? The Army and the police cannot go on strike because they are vital. Should the health service be excluded?

Peter Cheese: Obviously, it varies hugely across the health service, but a lot of voluntary service levels are already in place. It is such a difficult argument. Exactly as Gill said, there is a tightrope here. It is so important that we do not fracture relationships of this kind further, but I certainly understand arguments about the health service. I think service levels have been agreed across different trusts, and doctors and clinicians always start with their duty of care to patients. That is not always true in every environment, I recognise, but you are also trying to play to the context rather than saying, "Let's have one universal piece of legislation that forces every industry to think this through".

Q62 **Bell Ribeiro-Addy:** During this inquiry, some have argued in favour of presumption of employment status to ensure that more workers benefit from employment law protections—for example, those working in the gig economy. Would you agree?

Peter Cheese: There are a number of aspects to consider. Just to be clear, how would you describe or define the gig economy?

Bell Ribeiro-Addy: I can think of variations of it, actually.

Peter Cheese: At the moment, we have three different states: employee status, worker status, and self-employed. Our view is that this is overly complex. In the distinction between worker status and employee status, there are some very particular things, such as the right to holiday and sick leave, non-discrimination, and things of that nature. We understand from our work in many smaller businesses that they do not understand the distinction. You are either an employee or not an employee. There is also a distinction between legislation and tax—for example, IR35, which does not recognise worker status.

This is not a bad time to step back and say, "Are those different categories overcomplicating things?", versus saying, "I'm either an employee or I'm self-employed". That probably plays to your point, the presumption being that, unless I can clearly show that I am self-employed, I am employed. IR35 and the tax perspective have moved it in that direction anyway.

Bell Ribeiro-Addy: Gill, what is your view?

Gill Hunter: I think that is right. There is a conflation of lots of different things, particularly around tax, because that is generally a concern when people are engaging with consultancies. Are they actually an employee, and should they be paying tax? So I agree in principle, but the implementation needs careful thought, because there are so many new and different ways of working that these distinctions between employee, self-employed and worker are blurring. Bringing in a wholesale presumption that you are employed could be disruptive for businesses that are working under different models, particularly innovative smaller businesses. Tech businesses, for instance, quite often work on an associate model. We do not want to stifle innovation and create extra bureaucracy for small businesses in having to convert people into

employees, which will obviously bring costs and additional process and could be quite difficult to manage from a practical point of view.

Bell Ribeiro-Addy: Who would you say was most impacted? You have touched on how it might impact employees differently. How would it impact employers, and who comes out of it the best?

Peter Cheese: As you said, this whole space is precarious and insecure work, and making sure that people are properly protected is really important, but, as we have stressed throughout this discussion, it is about a balance between that and what employers want. I am interested in your thoughts too, Gill, because our view is that not many businesses understand the distinctions between these different categories. As we both stress, the importance of simplicity is huge, because it is a complex legislative world and the distinction between a tax regime and a legislative regime around employment rights is, of itself, confusing.

Gill Hunter: Yes, and businesses always want clarity. They will work with whatever the legislation says, but it needs to be very clear, and at the moment it is a difficult thing for businesses to navigate.

On your question about who comes out of it the best, if we went into that world, it must be employees, because there will be a cohort of people who are not currently protected with employment rights who will become protected. Employers may have more regulation to deal with for people they have not had to deal with previously. That is not to erode the real value in people being employees and the protection they get from that, because most employers want to make sure that their employees are properly looked after. It is just how you implement it in such a way that it is easy for employers to understand what is expected of them, who fits into the various categories, what changes they need to make to process and procedure, and the way they treat those people.

Bell Ribeiro-Addy: I suppose the best example I could give of not being clear on who comes out of it the best is Uber drivers. They were brought under the category of employee, after a huge battle by most of them, but some did not quite agree that this was the best outcome, because once you are an employee you have obligations. It is not just simply that there are obligations on the employer. Can you think of any other examples where that might be the case? Who comes out of it the best?

Peter Cheese: You are right that there are many people who benefit from that much more unstructured form of work. In a true gig economy, like Uber drivers, many would argue that it is a piece of work that they do alongside another job, for example, and they can say, "I've finished my day job. I have two hours. I'll go out and do some driving to earn some extra money". They would not want all that complexity of being treated as an employee.

It is difficult, but we are both arguing for clarity on this, and, generally, I agree, particularly if you are talking about somebody whose main job this is. You would expect them to have the security that would be provided as

an employee. However, we have to be careful not to force away the idea that a gig economy is emerging where people can have true flexibility in what they do, how they do it and when they do it. It is also a feature of a changing world of work and something that helps many people to add to their income. People I talk to are saying, "Maybe in the future we will have two or three jobs all going on at once. Who knows?" Again, it is important in all these debates to try to strike the right balance.

Gill Hunter: Yes, and there is the added complexity that we are not constrained by place. You can have people who are working internationally from anywhere. I certainly see the portfolio career a lot, and young people in particular are not fixed by the idea of working for one employer; they are quite happy to work for lots of different people. So how you build that in, on an international scale as well, is quite challenging.

Q63 **Bell Ribeiro-Addy:** The Worker Protection (Amendment of Equality Act 2010) Bill that is currently before Parliament wants to re-establish employer liability for the sexual harassment of workers by third parties under the Equality Act 2010. What impact do you think that would have on employers?

Gill Hunter: That is something I have really mixed feelings about. It used to be part of law and it was taken out. I do not know why. Now it is proposed that it comes back in again. It is good that employers are obliged to make sure that they protect their employees from harassment of any kind. However, it is quite difficult to see how to implement this practically. Again, I sound a bit like a broken record. If, for example, you operate a series of drive-through restaurants, one of your employees is at the hatch serving customers and a customer is sexually abusive towards that person and then drives off, how practically do you prevent that from happening? After the event, you can look after your employee and make sure that they are all right, but that is not about you taking steps to prevent it from happening in the first place.

At the moment, the Bill talks about reasonable steps. Again, you will need a lot of guidance to illustrate what you mean by a reasonable step; otherwise, there will just be lots of notices up everywhere saying, "We don't tolerate any abuse of our people". That is really not what the legislation should be aiming to do, because you will end up with employers looking at what boxes they need to tick in order to have a defence if something goes wrong.

The Bernard Manning case was mentioned in the first part of the session, and there is a particular problem in hospitality. You can see that an employer facing multiple claims from one incident could be very difficult to manage. I also worry that, if it stays with sexual harassment, it will end up discriminating against women and other vulnerable people, because employers will be reluctant to put them into public-facing roles if they feel that they could be liable for the actions of the public.

Peter Cheese: I would agree. What is sad, of course, is that these issues are becoming more and more widespread in hospitality, retail, places like that, but I absolutely agree with the point. There are lots of questions about enforcement in relation to many aspects of legislation in this space and in others. Our enforcement systems and mechanisms are too fragmented anyway; there are too many different bodies. One idea that we have been discussing is creating a single enforcement body that brings a lot of these things together.

Employers must have a duty of care to employees. They need to protect them and support them, but it is very hard if you also have third-party liability, which is not to say that unfortunately a lot of workplace harassment comes from third parties and customers.

Training and support that applies to wherever that harassment is coming from is extremely important and should be part of a healthy workplace culture. But I agree with Gill. I do not know how you would separate the legislation and the additional third-party liabilities versus your overall duty of care to support your people.

Bell Ribeiro-Addy: It would be good if you could let me know whether you agree with this. You could look at it in the same way as you do safety, although it is a bit more complex. If the employer had done everything it could to prevent the said harassment, would it be okay to say that it had met its duty? If it could not have done anything beyond that, it would not be liable. Would it be possible to draw up a framework in that sense?

Gill Hunter: Yes, if it is in the context of the resources of the business, because there is a very big difference between a large plc with huge resources and a lot of the businesses I work with. In my own business, with a small team and limited resources, we would face exactly the same potential issues from people who our employees interact with that a large business would. It has to be proportionate to the resources available to the business as well.

It is easier to implement in an office environment, but if you have visitors coming in, such as somebody coming in to clean the windows, are you supposed to run through a code of conduct or training with them before they are allowed on to the premises? It is that sort of guidance that is needed. Obviously if you are dealing with the public, you cannot enforce anything against anybody, other than by refusing to have them in your premises in the first place.

Peter Cheese: There is a definition of what is reasonable and context-specific, but by and large in the business world, when you have contractors coming into your business, people tend to behave in a more professional way. The sad part is how people interact in the public domain space, and it is very hard to legislate for that.

The examples we are seeing more and more of are signs that say, "Do not harass our staff", and that you could be liable to such and such. It is

very difficult to legislate for, but it is an important discussion. Existing legislation covers some things, but I come back to the point about enforcement. With all these areas of practice, one of our issues is the ability to enforce and to follow up.

Chair: Just to clarify, the Worker Protection (Amendment of Equality Act 2010) Bill, which has not received Royal Assent yet but has been through the Lords, re-establishes employer liability for sexual harassment only. There was an earlier suggestion that it should cover all kinds of harassment.

My understanding of the original Equality Act was that the prohibition was designed for a situation where, for example, somebody is operating a warehouse, and a visiting delivery van driver arrives once a week and sexually harasses female members of staff there who complains to the employer. Under the old provisions, the employer would have to do something about it, as they would under the new provisions.

If it was to be thrown out more widely to cover harassment generally, that would mean that employers, particularly in the hospitality area, might find themselves in a situation where their employee complained of being harassed merely by overhearing a conversation from some people in a pub about a subject they did not like or agree with.

I know that some people who commented on the earlier iteration of the Bill were worried about how that was going to be addressed. I wondered what your views were about the Bill as it currently is, and the desirability of bringing back a duty to prevent sexual harassment by third parties as opposed to any kind of harassment by third parties.

Gill Hunter: I do not understand why there is this distinction around sexual harassment. I do not think sexual harassment is any worse than somebody being harassed because of their race or sexual orientation, so I do not understand why it requires special treatment.

Chair: You could imagine the lorry driver coming in once a week and racially abusing employees, which we would all see as equally offensive.

Peter Cheese: Is that not covered by the legislation?

Chair: No, it is not, because the new legislation only covers sexual harassment. It has not been brought into force yet.

Peter Cheese: Yes, but surely under racial discrimination laws—

Chair: The employer does not have a duty to prevent racial discrimination by third parties.

Peter Cheese: Yes, but they could use the racial discrimination/racial equalities Acts to—

Chair: —go against the employer of the other chap.

Peter Cheese: Yes.

Gill Hunter: To me, there does not seem to be a particular logic as to why you would just focus on sexual harassment. The broader it is, the more employers will have to deal with. I am not advocating for it to be expanded and the obligations increased, but it does not make much sense to me.

Peter Cheese: Yes, and because you are articulate, you can get into all the beliefs stuff and, "Was I harassed in a pub because of a disagreement about beliefs?" As we know, that is a difficult area, and it has been proven through case law and so forth. It is a difficult one, because we would always argue for tighter definitions because of the grey areas that these bring about. You could argue that sexual harassment was reasonably clearly defined, but, then, why would you not add things like racial discrimination? Certain things are covered, as I said, by other forms of legislation that you could then introduce, but general harassment seems to be a very difficult one to define effectively.

Chair: Thank you very much. That has been very helpful. We were very keen to get the employer's perspective, and you have given us a pretty good overview of the challenges of being an employer and grappling with the law in this area.